United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

B pls

74-1894

To be argued by
T. BARRY KINGHAM

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 74-1894

UNITED STATES OF AMERICA,
Appellee,

—v—

RAYMOND MARQUEZ,
Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES OF AMERICA

PAUL J. CURRAN,
United States Attorney for the Southern District of New York, Attorney for the United States of America.

T. BARRY KINGHAM,
S. ANDREW SCHAFFER,
Assistant United States Attorneys, Of Counsel.

TABLE OF CONTENTS

TABLE OF CASES

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 74-1894

UNITED STATES OF AMERICA,

Appellee,

—v—

RAYMOND MARQUEZ,

Defendant-Appellant.

BRIEF FOR THE UNITED STATES OF AMERICA

Preliminary Statement

Raymond Marquez appeals from an order of the Honorable Walter R. Mansfield, United States Circuit Judge, entered on May 17, 1974, denying the defendant's motion under Rule 36, Federal Rules of Criminal Procedure, to correct the written judgment and docket entries to conform to the oral pronouncement of sentence by Judge Mansfield, then United States District Judge, on October 22, 1969.

On September 11, 1969, after a six-day trial before Judge Mansfield and a jury, Marquez was convicted on Indictment 69 Cr. 240 of one count of conspiracy to violate Title 18, United States Code, Section 1952 relating to the unlawful use of interstate commerce and the mails to facilitate gambling. The trial of a substantive count under Section 1952 resulted in a mistrial.

On October 22, 1969, Marquez was sentenced by Judge Mansfield to a term of five years' imprisonment, a fine of $10,000.00 and to pay the costs of prosecution. A notice of appeal was timely filed that day, and this Court affirmed Marquez' conviction on November 6, 1970.

On February 4, 1971, Marquez filed a motion for modification of sentence, which was denied by Judge Mansfield by an order dated February 18, 1971.

Statement of Facts

Announcing Marquez' sentence in open court on October 22, 1969, Judge Mansfield stated:

> In the case of the defendant Marquez, the sentence of the Court is that it is adjudged that he is to be committed to the custody of the Attorney General or his authorized representative for imprisonment pursuant to his conviction on count 2 of the indictment for a term of five years, and that he be fined in addition the sum of $10,000, and that he be required to pay the cost of the prosecution in this case against him (Tr. 24, 25).*

In the written Judgment and Commitment dated the same day, the sentence is recorded in the following manner:

> Five (5) years on count 2 and fined $10,000.00. The fine on count 2 is to be paid or the defendant is to stand committed until the fine is paid or he is discharged according to law. It is further Ordered that the defendant is to pay the cost of prosecution against him in this case (A. 13a).**

In substance the docket sheet contains the information recorded in the written Judgment and Commitment (A. 4a).

---

* "Tr." refers to the minutes of the sentencing hearing.

** "A" refers to appellant's appendix.

ARGUMENT

The motion to correct the judgment of the District Court was properly denied.

Marquez contends that Judge Mansfield erroneously denied the motion to correct the judgment and docket entries because those papers contain a direction that the fine of $10,000 is a "committed" fine, whereas the sentence pronounced orally in court is silent on the subject. Marquez argues that despite the unequivocal provision for a committed fine in the written judgment, prepared in accordance with Rule 32(b), Federal Rules of Criminal Procedure, the actual sentence of the trial court was for a non-committed fine because Judge Mansfield did not specifically state to the contrary in open court.* This position is without merit because the ambiguous silence of the oral sentence concerning the committed fine may properly be confirmed by reference to the clear language of the written judgment.

The ultimate question here is how to determine the intention of the sentencing judge. Sometimes that intention may not be gleaned from his oral sentence alone, for on occasion judges are inadvertently imprecise. In this regard, the Supreme Court noted in *United States* v. *Daugherty*, 269 U.S. 360, 363 (1926):

> "Sentences in criminal cases should reveal with fair certainty the intent of the court and exclude any serious misapprehensions by those who must execute them. *The elimination of every possible doubt cannot be demanded* (emphasis added).

---

* Through investigation counsel for the United States have learned that by order of the United States Parole Board dated July 11, 1974, the defendant will be paroled on September 26, 1974, "provided that the committed fine has been paid or otherwise discharged according to law under 18 U.S.C. § 3569."

There can be no question here that Judge Mansfield always intended to impose a committed fine, despite the absence of operative language to that effect in the oral sentence. His written judgment, prepared October 22, 1969, the same day as the oral sentence, contains the appropriate language. Moreover, it is clear from the circumstances at the time of the sentencing that Judge Mansfield intended to impose the maximum sentence possible under 18 U.S.C. § 1952, five years' imprisonment and a $10,000 fine. Obviously his intention was to exercise his discretion to the defendant's detriment in two other areas of punishment as well: he imposed a committed fine, and levied the costs of prosecution under 28 U.S.C. § 1918.

Citing *Hill* v. *United States ex rel Wampler*, 298 U.S. 460, 463 (1936), Marquez argues that the case law is "quite clear that if the direction for imprisonment is omitted, the fine is not a committed fine" (Appellant's Brief at 6). This position finds support in *United States* v. *Buchanan*, 195 F. Supp. 713 (ED Ky. 1961) and *United States* v. *Smith*, 28 F. Supp. 726 (ED Pa. 1939), as the defendant points out. However, these cases fail to recognize that the "judgment" in a criminal case is the written document signed by the judge and clerk. Rule 32(b)(1), Federal Rules of Criminal Procedure. Prior to the enactment of that rule in 1946,* only the oral pronouncement

---

* Rule 32(b) provides in pertinent part:

> A judgment of conviction shall set forth the plea, the verdict or findings, and the adjudication and sentence. . . . The judgment shall be signed by the judge and entered by the clerk.

The previous rules were contained in Rule I of the Rules of Practice and Procedure promulgated by the Supreme Court in May, 1934. 292 U.S. 661, 662 (1934). There is no reference to a written judgment in those rules, which merely required that sentence be imposed "without delay."

of sentence constituted the judgment of the trial court. *Baca* v. *United States*, 383 F.2d 154, 157 (10th Cir. 1957). Obviously the Rule 32(b) "judgment" in this case—the written confirmation of the oral sentence—includes a committed fine.

The Government recognizes that where a conflict exists between the provisions of the oral sentence and the terms of the written judgment, the former must be given effect. *United States* v. *Hicks*, 455 F.2d 329 (9th Cir. 1972). However, where the oral pronouncement is ambiguous, the written judgment must be considered in order to determine the intention of the sentencing judge. *Baca* v. *United States, supra; Payne* v. *Madigan*, 274 F.2d 702, 705 (9th Cir. 1960), *aff'd* 366 U.S. 761 (1961). In this regard, the Court noted in *Scott* v. *United States*, 434 F.2d 11, 20 (5th Cir. 1970):

> "The law is well settled that if there were any conflict between the oral pronouncement of judgment and the written judgment itself, the terms of the oral pronouncement would control. So, if the two conflict, the oral pronouncement controls. On the other hand, there may be no conflict but simply an ambiguity. The actual intention of the sentencing judge is to be ascertained both by what he said from the bench and by the terms of the order he signed, or from his total acts."

If an ambiguity remains after consideration of both the oral sentence and written judgment, the oral sentence must control, and the ambiguity must be resolved in the defendant's favor. *United States* v. *Chiarella*, 214 F.2d 838, 841 (2d Cir.), *cert. denied*, 348 U.S. 902 (1954).* In

---

* Marquez apparently misreads the *Chiarella* case to hold that ambiguity in the oral pronouncement alone is sufficient to require resolution in the defendant's favor. However, the Court in *Chiarella* expressly indicated that *both* the oral and written sentences had to be considered in determining whether any uncertainty existed. 214 F.2d at 841.

the instant case, however, the ambiguity exists only in the oral sentence and it is fully and properly resolved by reference to the written judgment. Considering both the written and oral sentences there remains no ambiguity to be resolved in anyone's favor. The fine imposed was and is a committed fine.

In *Sobell* v. *United States*, 407 F.2d 180 (2d Cir. 1969), upon which Marquez now relies, this Court considered a question similar to the issue at bar. In *Sobell*, Judge Kaufman, sitting as a trial judge in the District Court, had been asked by defense counsel at the time of sentencing whether the months of pretrial incarceration served by the defendant had been considered in assessing the maximum thirty-year prison term. Judge Kaufman replied, "No, they are not, but I will have to sign the judgment. They have to be so considered." *Id.*, at 183. The written judgment then contained no reference to credit for pretrial jail time.

Writing for the Court in *Sobell*, Judge Hays held that 18 U.S.C. § 3568 required credit for pretrial incarceration. *Id.*, at 181. He was joined in that opinion by Judge Friendly, *id.*, at 185, who also joined in the concurring opinion of Judge Moore. The conclusion reached by Judge Moore was that at the worst Judge Kaufman's words in sentencing Sobell had been ambiguous, that such ambiguities must be resolved in the defendant's favor, and that the oral pronouncement at the time of sentence controlled a determination of the actual terms of the sentence. *Id.*, at 183, 184. In deciding that the written judgment should not control, Judge Moore relied upon two cases in which no ambiguity existed in the oral sentences, unlike the case at bar. In *Henley* v. *Heritage*, 337 F.2d 847, 848 (5th Cir. 1964) and *Kennedy* v. *Reid*, 249 F.2d 493, 495 (D.C. Cir. 1957), the trial judges had announced unequivocally that the respective defendants' sentences were to run consecutively. Accordingly, there was no ambiguity to be resolved

by reference to the written judgment, nor ultimately to be resolved in the defendant's favor. Significantly, in the *Henley* case, 337 F.2d at 848, 849, the Court referred to its prior decision in *Paccione* v. *Heritage*, 323 F.2d 378 (5th Cir. 1963), *cert. denied*, 377 U.S. 955 (1964), in which the Court *had* resorted to a written judgment to resolve an ambiguity in the oral sentence.

In *Sobell*, 407 F.2d at 184, Judge Moore also relied upon *United States* v. *Chiarella*, *supra*, for the proposition that ambiguities must be resolved in the defendant's favor. Of course, in *Sobell* ambiguities existed both in the oral and written sentences.* That is, the pronouncement uttered in court was that the pretrial time would have to be considered, yet the terms of the written judgment failed to indicate whether or not the consideration had been given. Thus, an ambiguity or conflict existed after consideration of both the oral and written evidence of intent: had Judge Kaufman considered the pretrial incarceration or not? A resolution in the defendant's favor was clearly appropriate under those circumstances, and Judge Moore's reliance upon *Chiarella* was correct. The ambiguity could not be resolved after considering both the verbal and written sentences, and thus had to be resolved in the defendant's favor.

The case at bar presents different circumstances. Here, the question of whether Judge Mansfield had intended to impose a committed fine existed only on the oral sentence. The question is easily resolved by reference to his written judgment, which confirms his intention to adjudge such a fine. Accordingly, the holdings of *Sobell*, *Henley* and *Kennedy* are inapposite here. None of those cases involves the facts present in this case, in which no conflict exists between oral and written statements when both are considered.

---

* Initially, Judge Moore opined that he did not think the oral pronouncement was ambiguous. 407 F.2d at 184.

It is important to recognize that this is not a case in which the judge delayed his docket entry, nor is it a case in which later motions were presented to another judge. This case has been considered throughout by Judge Mansfield, who held unequivocally below:

> The court's intent to impose a committed fine is confirmed by the provisions of the judgment itself. In addition we directed that he pay the cost of prosecution against him in the case (A. 30).

There can be no clearer statement of the judge's intention. He has repeatedly indicated that the fine in this case was to be committed. To have granted Marquez' motion below would have repudiated the intention Judge Mansfield held and expressed on the day of sentencing, October 22, 1969. To afford Marquez relief at this point would have the same effect, and would grant the defendant a benefit which the sentencing judge never contemplated he would receive.

CONCLUSION

Judge Mansfield's denial of the defendant's motion should be affirmed.

Respectfully submitted,

PAUL J. CURRAN,
United States Attorney for the Southern District of New York, Attorney for the United States of America.

T. BARRY KINGHAM,
S. ANDREW SCHAFFER,
Assistant United States Attorneys,
Of Counsel.

★ U. S. Government Printing Office 1974—614—240 / 392—74

AFFIDAVIT OF MAILING

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

T. BARRY KINGHAM being duly sworn, deposes and says that he is employed in the office of the United States Attorney for the Southern District of New York.

That on the 29th day of July, 1974 he served 2 copies of the within brief by placing the same in a properly postpaid franked envelope addressed:

J. Jeffrey Weisenfeld, Esq.
Goldberger, Feldman & Breitbart
401 Broadway
New York, New York 10003

And deponent further says that he sealed the said envelope and placed the same in the mail drop for mailing at the United States Courthouse, Foley Square, Borough of Manhattan, City of New York.

T. Barry King
T. BARRY KINGHAM

Sworn to before me this
29th day of July, 1974

Alma Hanson

ALMA HANSON
NOTARY PUBLIC, State of New York
No. 24-6763450 Qualified in Kings Co.
Certificate filed in New York County
Commission Expires March 30, 1976